SUPREME COURT OF QUEENSLAND

CITATION:	*Cokara v Director of Public Prosecutions (Queensland)* [2012] QCA 250
PARTIES:	**MARKO COKARA** (appellant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (respondent)
FILE NO/S:	Appeal No 7174 of 2012 SC No 6417 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Bail Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2012
JUDGES:	Holmes and Gotterson JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the appellant was refused bail on a charge of perjury – where the primary judge found that the appellant presented unacceptable risks of re-offending, failing to appear and interfering with witnesses – where the appellant contended that the refusal of bail was so unreasonable that a failure properly to exercise his discretion could be inferred – whether the primary judge erred in the exercise of his discretion *Bail Act* 1980 (Qld), s 16 *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited
COUNSEL:	M W C Harrison for the appellant M B Lehane for the respondent
SOLICITORS:	Bell Miller Solicitors for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant appeals against a decision of a judge of the trial division refusing him bail on a charge of perjury. The ground of appeal on which he relies is that the primary judge erred in the exercise of his discretion in finding that he presented unacceptable risks of re-offending, failing to appear and interfering with witnesses. The appeal being from an exercise of discretion, it is necessary for the appellant to show error of the kind identified in *House v The King*.[1] His contention was that the refusal of bail was so unreasonable that a failure properly to exercise the underlying discretion (as to the assessment of risk) must be inferred.

The statutory discretion

[2] The primary judge's exercise of discretion was governed by ss 16(1) and (2) of the *Bail Act* 1980, the relevant parts of which are as follows:

> "**16 Refusal of bail**
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> (1) Notwithstanding this Act, a court … authorised by this Act to grant bail shall refuse to grant bail to a defendant if the court … is satisfied—
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> (a) that there is an unacceptable risk that the defendant if released on bail—
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> (i) would fail to appear and surrender into custody; or
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> (ii) would while released on bail—
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> (A) commit an offence; or
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> …
>
> (C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else…
>
> ….
>
> (2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court … shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of this provision, to such of the following considerations as appear to be relevant—
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> (a) the nature and seriousness of the offence;
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> (b) the character, antecedents, associations, home environment, employment and background of the defendant;
>
> (c) the history of any previous grants of bail to the defendant;

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1 (1936) 55 CLR 499 at 505.

> (d) the strength of the evidence against the defendant …"

The nature and seriousness of the alleged offence

[3] The charge of perjury related to evidence given by the appellant in a Crime and Misconduct Commission hearing where, it was alleged, he knowingly gave false testimony to the effect that he was not the user of a certain mobile telephone and was not present at a shopping centre on 12 April 2012. The context, at least on the Crown case, was that a man named Lee had gone to the shopping centre for the purpose of a drug transaction with the appellant and another man. During the transaction, Lee was shot, fatally.

[4] It was conceded by the appellant's solicitor at first instance that should he be convicted of the charge of perjury, he could expect a gaol sentence around the three year mark. A similar concession was made by counsel here; he acknowledged that such a sentence was inevitable given that the perjury was alleged in the context of investigation of a murder which the appellant was likely, on the Crown case, to have witnessed.

The strength of the evidence

[5] Lee had used a mobile telephone which was found to have stored in it the number for another mobile telephone service: the telephone which the appellant had denied using. There was a good deal of evidence to indicate that the appellant was, in fact, using it. That evidence included the statement of a witness that he had introduced Lee and the appellant to enable them to deal in drugs; that the appellant had given him the relevant telephone number; and that he in turn had given it to Lee. The third person said to have been actually present at the drug transaction identified the appellant as a participant; and evidence of mobile telephone use suggested that the appellant had had contact with the deceased in the hours before the shooting and was, contrary to his denial, at the shopping centre at the relevant time.

The appellant's antecedents, associations and employment

[6] The appellant is 21 years old. He was born in what was then Yugoslavia, moved to Australia with his family when he was seven and holds dual Australian and Bosnian citizenship. He lives with his parents; both his mother and his girlfriend swore affidavits in support of his bail application. According to his own affidavit, he has an expired passport and would undertake not to obtain another. His only sibling resides in Croatia. He is a plumbing apprentice who obtains employment through an agency. The manager responsible for his placement provided a statement describing him as "consistently unreliable"; he also said that he had recently been asked by the appellant to delete from his records all of the latter's old mobile telephone numbers. According to the police objection to bail, the appellant is an associate of the Bandidos motorcycle gang and of a man called Cuic, a member of the Bandidos suspected of being involved in Lee's murder. Cuic had left the country shortly after the killing.

The appellant's criminal history and compliance with orders

[7] The appellant has a criminal history, the most significant entries on which are offences of robbery in company, possession of a dangerous drug and assault

occasioning bodily harm. The robbery was a bag snatch by the appellant and two friends. When their victim pursued them and tried to open the door of their car, they drove away, knocking her to the ground and dragging her a short distance. The appellant was placed on probation and ordered to perform community service, but those orders were revoked when he was subsequently sentenced in the Supreme Court for possession of a dangerous drug (270 ecstasy tablets). The sentence imposed for that offence was 18 months imprisonment with parole release after six months. That was not the appellant's first offence of drug possession: he had two years earlier been convicted in the Magistrates Court of possessing 31 ecstasy tablets, but on that occasion no conviction was recorded. Instead he was placed on a good behaviour bond and a drug diversion order was made.

[8] Not long after being sentenced in the Supreme Court, the appellant was dealt with by way of a concurrent prison sentence for assault occasioning bodily harm; he had punched an unknown man twice in the back of the head. He was apprehended almost immediately but had to be taken to hospital because of an apparent drug overdose. That offence, committed on 4 July 2010, was the most recent of those recorded on the appellant's criminal history. Of some significance is the fact that it was committed while he was on bail on the possession charge. Two months after his release on parole, his parole was suspended and he was returned to prison after failing a urine test.

The primary judge's exercise of discretion

[9] In his reasons for refusing bail, the learned judge identified in the appellant's favour the fact that he had been arrested over a month after giving the alleged false testimony and could have fled the jurisdiction in the interim if he had wished to do so; that he had not failed to appear when previously charged with and convicted of offences; that he had ties to the community and had lived in Australia since he was a child. Another relevant factor was the length of time he was likely to remain in custody, having only been charged some three weeks before the bail application.

[10] On the other hand, his Honour noted, the applicant had a criminal record which included dishonesty and which suggested a history of use of illegal drugs, with no evidence to suggest any addiction he might have suffered from had ceased. His Honour remarked that the appellant was alleged to have been involved in an illegal drug transaction at the time of Mr Lee's murder. His employment history was not good and his attempt at inducing his employer to delete his mobile telephone numbers showed a preparedness to interfere with the course of justice. He had not severed connections with previous associates.

[11] In the learned judge's view, there was a risk that the appellant might attempt to flee overseas as well as the risk that he would take flight within Australia. He concluded:

> "In all the circumstances, given the gravity of the offence of perjury, his unsatisfactory history and the potential that he might be prevailed upon by others to take flight, I consider that there is an unacceptable risk that he will not appear if granted bail. There is also a risk that if released on bail he will commit further offences and interfere with witnesses.
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> I consider that the conditions proposed or similar conditions would not adequately reduce those risks to an acceptable level..."

The inference from the last sentence is that his Honour considered the risk of all three prospects – flight, re-offending and interference with witnesses – unacceptable.

The risk of flight

[12] The appellant submitted that the finding as to risk of flight was unreasonable in light of a number of facts. When he had originally received a notice to appear at the Crime and Misconduct Commission, although it was obvious he was in difficulty, he did not attempt to flee but presented himself. He had not previously failed to appear, and had ties to the jurisdiction in the form of his employment and the presence of his parents and his girlfriend in Brisbane. It was highly unlikely any attempt to flee overseas could succeed given the Government's control over ports through which he might exit. There was no evidence, it was contended, of the potential his Honour had described, that the appellant "might be prevailed upon by others to take flight". The possibility of flight existed in any situation, it was submitted, and was no greater in the present case.

[13] However, there were circumstances which made the appellant a greater risk of flight than might otherwise be the case. His dual citizenship and the fact that he had a family member in an overseas jurisdiction close to his alternative country of citizenship rendered flight a more realistic prospect for him than for others. The seriousness of the charge and the apparent strength of the Crown case were properly to be taken into account; but the possible impetus for flight was not confined to the prospect of a likely lengthy gaol sentence.

[14] The peculiar characteristic of the appellant's situation justifying an inference that others might prevail upon him to take flight was the fact that he seems, very probably, to have witnessed a murder. He had mutual connections with one suspect, Cuic, in the form of the Bandidos motorcycle gang (connections which, as his Honour noted, there was no evidence of his having severed). Cuic had already created a precedent for leaving the jurisdiction. The appellant's evidence at the Commission hearing had been signally unsuccessful in convincing the authorities that he was not present when Lee died. It was reasonable to suppose that both for him and those involved in the killing, it would be preferable if he were not at hand to give an accurate account of the events, and that mutual associates might encourage his departure.

[15] Against those considerations was the fact that the appellant's parents and girlfriend resided in Brisbane. He had, however, no assets in the jurisdiction and his employment was a tie of very dubious strength. The fact that the appellant did not flee when he received the notice to appear before the Crime and Misconduct Commission, or for that matter after his appearance, is of some import, but is not a powerful consideration. Assuming the appellant did, as alleged, choose to lie his way through the hearing, he was not then in a position to know (or, indeed, until he was charged) whether the Commission had any evidence to contradict him. I do not consider that his Honour's conclusions in this regard – that there was a risk of flight and that it was unacceptable – were unreasonable.

The risk of re-offending

[16] As to the risk of re-offending, the appellant contended that his criminal history showed no pattern of repeat offending of any particular type. His youth now and

when his prior offences were committed should have been taken into account. The charge of perjury was unusual and had been committed in circumstances where the appellant had been forced to give evidence; it was not a situation of his own seeking.

[17] The learned judge's observations of continuing drug use, and possible addiction, were warranted by a number of features. The appellant's criminal history contained two offences of drug possession, one very serious. He had been admitted to hospital as a result of a drug overdose; and in the breach of parole incident, he had failed a urine test. Finally, as his Honour remarked, he was alleged to have been taking part in an illegal drug deal at the time of the murder. All of that pointed compellingly to a risk of offending through the possession or supply of drugs, compounded by the fact that the appellant had previously breached probation, parole and bail orders, suggesting a lack of inhibition in that regard. Again, I do not think there was anything unreasonable about his Honour's conclusion that there was a risk of re-offending of unacceptable proportions.

The risk of interference with witnesses

[18] As to the risk of interference with witnesses, his Honour seems to have relied on the fact that the appellant had, before he was charged, asked his employer to delete his previous mobile telephone numbers. I do not think that fact, without more, would support an inference that he was disposed to interfere with witnesses of such strength as to give rise to an unacceptable risk. In this regard, his Honour may have erred. That is of no consequence, however, given that his Honour's conclusions as to unacceptable risk of flight and re-offending were open and reasonable, and once drawn required a refusal of bail.

Order

[19] I would dismiss the appeal.

[20] **GOTTERSON JA:** I agree with the order proposed by Holmes JA in the appeal and with her Honour's reasons for making it.

[21] **PHILIP McMURDO J:** I agree with Holmes JA.